Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	)	WC Docket No. 03-251

REPLY COMMENTS OF T-MOBILE USA, INC.

I. INTRODUCTION.

T-Mobile USA Inc. ("T-Mobile") replies in this important inquiry because the comments underscore the need for expeditious Commission action to craft a rule requiring incumbent local exchange carriers ("ILECs") to provide cost-based, stand-alone DSL on a nondiscriminatory basis separate from legacy voice services ("naked DSL").[1] ILECs' provision of naked DSL in addition to their other offerings will promote the development of innovative offerings like the potential new Internet Protocol ("IP")-based applications that T-Mobile is assessing. If successful, these applications in turn will increase consumers' demand for broadband access,

[1] As a national wireless provider, T-Mobile owns licenses covering 253 million people in 46 of the top 50 U.S. markets. T-Mobile currently serves more than 18 million customers in the United States. Via its HotSpot service, T-Mobile also provides Wi-Fi (802.11b) wireless broadband Internet access in about 5,700 convenient U.S. locations, such as Starbucks coffee houses, Hyatt hotels, airports, and airline clubs, making it the largest carrier-owned Wi-Fi network in the world. All comments filed on June 13, 2005, in WT Docket No. 03-251 will hereinafter be short cited.

consistent with federal policy goals. They also would provide direct intermodal competition with voice and other broadband applications that wireline carriers now offer on a bundled basis. T-Mobile, as an independent, nationwide wireless carrier, participates daily in highly competitive markets and does not believe in regulation for its own sake. But T-Mobile agrees that in this area, "there is still more that the government must do to spur broadband deployment."[2] A narrowly targeted rule to remedy the lack of naked DSL offerings will ensure that a free and competitive market delivers to consumers the innovative broadband applications that will drive consumer demand for broadband access.

II. THE RECORD SHOWS THAT A COST-BASED, STAND-ALONE DSL REQUIREMENT WILL PROMOTE BROADBAND INNOVATION AND CONSUMER CHOICE.

A. Competition In The Provision Of Broadband Pipes To Consumers is Limited.

The record in this proceeding shows that, contrary to some ILECs' sweeping claims, the current consumer marketplace for broadband access is far from fully competitive. In particular, DSL appears to be the only available form of broadband in many areas of the United States.[3] Although some cable operators offer stand-alone broadband cable modem service to consumers,

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[2] *See* Kevin J. Martin, Chairman, FCC, *United States of Broadband*, Wall St. J., July 7, 2005, at A12 (also stating that the Commission must be vigilant in protecting consumers and that speeding the deployment of broadband throughout the U.S. is the Chairman's highest priority).

[3] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2004*, at Table 13 (rel. July 7, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf ("*High-Speed Access Report*") (demonstrating that 17 percent of all zip codes nationwide have one or zero high speed lines in service as of December 31, 2004, and that, for rural states, the same figure is as high as 64 percent); Earthlink Comments at A4 (citing the Pew Internet & American Life Study, which reports that at least 17 percent of consumers are served by just one last mile broadband provider); *High-Speed Access Report* at Tables 6, 10 (suggesting that cable-based competition to DSL in at least 10 rural states is meager, at best).

the availability of such service in some areas apparently does not place sufficiently strong competitive pressures on ILECs to induce them to offer naked DSL. This often leaves consumers no choice for broadband access but their ILEC's bundled DSL/voice offerings.[4] The continued refusal of some major ILECs to offer naked DSL in addition to their other service bundles indicates a failure of competition in the broadband access marketplace that can be remedied by a narrowly targeted rule.[5]

B. The Comments Show That Lack of Stand-Alone DSL Limits Consumer Choice, Innovation, And Competition.

Many commenters recognize that the current limited availability of broadband access deprives consumers of competitive choice.[6] The record shows further that the lack of competitive pressure in the provision of broadband access inhibits innovation.[7] For example, the inability of consumers to purchase naked DSL significantly harms competition from innovative providers of Voice Over Internet Protocol ("VOIP") services because "[c]onsumers are far less likely to purchase a competitive VOIP offering if they are required to purchase redundant ILEC

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[4] According to the Pew Internet & American Life Study, ILECs' market share for ADSL lines is 95%. *See* Earthlink Comments at A3.

[5] The harmful effects of ILECs' anticompetitive behavior are particularly serious in areas where cable modem service is absent, which include many rural areas in the United States. Even if the relevant product market for assessing competition were to include cable modem service, a questionable premise based on the record, *see* CompTel/ALTS Comments at 8 ("ILECs have market power in the provision of DSL service . . ."), the Commission's own reports show that cable modem service often is wholly absent from many parts of the country. *See High-Speed Access Report*.

[6] *See*, *e.g.*, Vonage Comments at 2; RNK Comments at 5; CompTel/ALTS Comments at 4-6; Earthlink Comments at 4-5; Nat'l Ass'n of State Utility Consumer Advocates Comments at 2-4; Texas Office of Public Utility Counsel's Comments at 4.

[7] *See* CompTel/ALTS Comments at 8 (arguing that bundling of voice and DSL services chokes deployment of VOIP).

voice service . . ."[8] As CompTel/ALTS stated, ILECs' tying practices "stifle implementation of VOIP services which . . . are poised to accelerate the deployment of broadband facilities and services."[9] A narrow rule requiring ILEC provision of naked DSL will ensure that the protectionist and exclusionary practices of ILECs do not smother nascent technologies like current VOIP offerings and the advanced broadband applications that T-Mobile is considering.

The ILECs' arguments about realizing economies of scale achieved through linking voice and DSL[10] appear to be shorthand for attaining profit by excluding competitors from markets for broadband applications that could compete with ILEC offerings such as voice.[11] Such exclusionary actions limit the availability of those competitive, innovative applications that will increase consumer demand for broadband access. Earthlink and CompTel/ALTS demonstrate that ILECs' refusal to provide naked DSL causes consumers to purchase legacy voice service that they do not want to purchase at all or may have preferred to purchase elsewhere.[12] When ILECs do not offer DSL apart from voice service, competitors cannot economically offer competing voice/DSL bundles or other advanced applications like those that T-Mobile is assessing.[13]

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[8] *See* Earthlink Comments at 5.

[9] *See* CompTel/ALTS Comments at 8.

[10] *See*, *e.g.*, Verizon Comments at 4, 6-7; SBC Comments at 18.

[11] *See generally* Comments of Nat'l Ass'n of State Utility Consumer Advocates at 2.

[12] *See* Earthlink Comments at 3 n.4 (citing *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984)); CompTel/ALTS comments at 7-8.

[13] *See Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 504-505 & n.2 (1969) (stating that market power can exist in the absence of high market share where a seller offers a unique product which competitors cannot economically offer themselves because of the seller's

(Footnote continues on next page.)

The record is replete with evidence that, to gain anticompetitive advantage, ILECs refuse to sell DSL on a stand-alone basis. As the record shows, certain ILECs "refuse to disaggregate. . . *at any price*."[14] If the market were able to check this anticompetitive behavior, it would already do so.[15] RNK's comments demonstrate that for some ILECs, tying of broadband and voice is an "all or nothing" scheme that deprives consumers of choice and strips interconnected VOIP providers of any ability to enter markets where tying is imposed.[16] For all of these reasons, Qwest, the largest ILEC actually to offer stand-alone DSL, is wrong when it argues that existing safeguards sufficiently protect against anticompetitive behavior.[17] The record also demonstrates that, contrary to ILEC claims,[18] there is no technical reason for ILECs to refuse to offer DSL separate from voice services.[19] Qwest's provision of stand-alone DSL makes other ILECs' claims of technical infeasibility appear disingenuous.[20] The absence of any valid technical explanation for ILECs' refusal to offer DSL separate from voice service underscores the anticompetitive objective of the practice.

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cost advantage); *see also Fox Motors, Inc. v. Mazda Distributors (Gulf)*, 806 F.2d 953, 957 (10th Cir. 1986) (citations omitted); *see also Jefferson Parish*, 466 U.S. at 14-18.

[14] *See* Vonage Comments at 2 (emphasis added).

[15] *Id*.

[16] *See* RNK Comments at 10, 12.

[17] *See* Qwest Comments at 3.

[18] *See, e.g.*, BellSouth Comments at 5.

[19] *See* CompTel/ALTS Comments at 6.

[20] *See* Qwest Comments at 4.

C. The Record Demonstrates that ILEC Refusals to Provide Naked DSL are Contrary to the Communications Act and Other Statutes.

As Earthlink, CompTel/ALTS, and T-Mobile demonstrated in their initial comments, some ILECs' refusal to sell DSL separate from their legacy voice services is contrary to the Communications Act (the "Act") and other statutes.[21] Section 201 of the Act declares as unlawful, among other things, any unjust or unreasonable charge, practice, classification, or regulation in connection with communication service.[22] ILECs' tying of legacy voice services to DSL is anticompetitive conduct that qualifies as an unjust and unreasonable practice that violates Section 201(b). As the record shows, ILECs' refusal to offer stand-alone DSL also is unreasonably discriminatory under Section 202 of the Act because ILECs realize profits based on the actual costs of DSL while denying such service to certain consumers and competitors.[23] Initiating a rulemaking is an important first step in preventing further unjust and unreasonable practices and fulfilling the Commission's duty to encourage the provision of new technologies and services to the public.[24]

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[21] *See* T-Mobile Comments at 4-5; Earthlink Comments at 2-5; CompTel/ALTS Comments at 6-7.

[22] 47 U.S.C. § 201(b).

[23] *See id.* § 202. *See also* CompTel/ALTS Comments at 9 (ILECs' refusal to sell DSL is an unjust and unreasonable practice); Maryland Public Service Commission Comments at 5 (stating that Verizon MD's tying arrangements are discriminatory and hamper local competition). CompTel/ALTS also notes in its comments that each of the elements of a classic tying arrangement is present in the ILECs' bundling practices. *See* CompTel/ALTS Comments at 7-8 (ILEC bundling satisfies each element of anticompetitive tying: it allows ILECs to shield their significant voice customer bases; allows ILECs to regain voice customers they may have lost by requiring end users to boycott other voice providers as a condition of receiving DSL; and stifles implementation of VOIP services).

[24] *See* Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

III. THE COMMISSION SHOULD ACT PROMPTLY TO PROMOTE BROADBAND INNOVATION AND CONSUMER CHOICE.

A. The Commission Has Ample Authority to Remedy the Competitive Harms Caused by ILEC Tying Practices And Should Act Promptly.

The Commission has the power and duty to remedy the ILECs' anticompetitive practices regarding DSL. The Commission repeatedly has stated that its public interest authority is not constrained to the scope of the antitrust statutes.[25] In the recent *Brand X* decision, the U.S. Supreme Court recognized the Commission's "expert policy judgment" in addressing "a subject matter [that] is technical, complex and dynamic."[26] In *Brand X*, the Court upheld the Commission's classification of cable modem service as an information service.[27] The Court noted a Commission conclusion that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[28] The Court afforded deference to the Commission in crafting such "minimal" regulations. According to the

[25] *See WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, ¶ 12 (1998) ("our public interest evaluation is distinct from, and broader than, the competitive analyses conducted by antitrust authorities"); *see also AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834, ¶¶ 23-25 (1988) (stating that strict antitrust analysis was unnecessary because bundling practice was unreasonable under Section 201(b)). Comcast therefore is incorrect when it argues that forms of bundling other than a narrow, antitrust concept of "tying" are irrelevant to the Commission's inquiry. Comcast Comments at 3.

[26] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, Nos. 04-277 and 04-281, slip op. at 31 (June 27, 2005) ("*Brand X*").

[27] *Id*. at 17 (noting that "[t]he integrated character of this offering led the Commission to conclude that cable modem service is not a 'stand-alone,' transparent offering of telecommunications.").

[28] *Id*. at 30 (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling, 17 FCC Rcd 4798, ¶ 5 (2002))

Court, the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[29]

A narrowly targeted naked DSL requirement is precisely the type of minimal regulation that would promote consumer choice, innovation, and the benefits of a competitive market that currently do not exist. The Court in *Brand X* quoted Commission findings from 2002 that new forms of broadband access are emerging.[30] However, as Earthlink points out, the Commission's more recent reports show that fixed wireless and satellite providers have extremely low market share and have had little effect on the uneven competition in the broadband access marketplace.[31] Unlike cable modem service, the DSL/voice bundle is not an integrated service offering where the telecommunications component is merely a necessary component of Internet access. The voice service that some ILECs are bundling with their DSL offerings is a distinct offering that is the quintessential telecommunications service. Because of the anticompetitive effects of ILEC tying practices, there is every reason to address ILECs' tying of DSL and traditional voice service differently from cable modem service.[32]

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[29] *Id*. at 25.

[30] *Id*. at 30.

[31] *See* Comments of Earthlink at A1 (stating that fixed wireless and satellite hold insufficient market share to be considered serious competition); *see also High-Speed Access Report*, at Chart 2 (showing that the combined market share of satellite, wireless, fiber and powerline broadband access providers is just 3.3 percent). Although satellite, wireless, fiber and powerline broadband access providers have increased their market share, their total market share indicates that competition is not robust.

[32] As the Court concluded, facilities-based information service providers historically have received different regulatory treatment because "'the telephone network [was] the primary, if not the exclusive, means through which information service providers can gain access to their customers.'" *Brand X* at 30.

B. A Targeted, Nationwide Rule is Necessary.

Addressing ILEC tying practices on a case-by-case basis, as certain commenters suggest,[33] would be wholly inadequate. Relying on adjudicatory proceedings to correct the anticompetitive harms described above will not provide innovators with the certainty they need to commit resources to broadband innovation. Innovators will be reluctant to invest the large sums necessary to develop and deploy new advanced broadband services like the kind that T-Mobile currently is assessing without certainty that a necessary input – stand-alone DSL – will be available. Given the record of abuse by ILECs described above, case-by-case adjudication of allegations of anticompetitive tying will only delay and perhaps deter altogether deployment of new broadband applications by competitive suppliers.

An immediate rulemaking is also warranted because numerous state public service commissions have found that ILECs have acted anticompetitively in this area. Regulators in Florida, Kentucky, Louisiana, Georgia, and Maryland have found ILECs' tying practices to be anticompetitive.[34] Having preempted states from regulating DSL/voice bundles,[35] the

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[33] *See* Comcast Comments at 5-6; Sprint Comments at 2.

[34] *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, ¶¶ 9-14 (2005) ("*NOI*"); *see also* Maryland Public Service Commission Comments at 5 (June 10, 2005). Similarly, the staff of New York Public Service Commission recently has sought comment on its tentative conclusion that requiring Verizon to offer unrestricted naked DSL would offset the anticompetitive harm associated with the highly concentrated post-merger mass market. *See* New York Dep't of Public Service Staff White Paper, Case Nos. 05-C-0237 and 05-C-0242, at 26 (NY PSC July 6, 2005) *available at* http://www.pulpny.org/05-c-0237-7-8-05.pdf.

[35] *NOI* ¶¶ 16, 30, 44.

Commission should act now to ensure that broadband applications are available to U.S. consumers in a competitive marketplace.

The harm that ILECs' tying is doing to innovation and consumer choice requires that the Commission exercise its authority to require stand-alone DSL, and that it does so quickly. At the same time, the Commission should condition approval of the pending wireline mergers on the availability of cost-based DSL on a non-discriminatory basis.

IV. CONCLUSION.

To promote the development of broadband services and intermodal competition, and to prevent competitive abuses by certain ILECs, the Commission should propose immediately to require ILECs to offer naked DSL services on a cost-based, nondiscriminatory basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2005, a copy of the foregoing **REPLY COMMENTS** was served by electronic mail, upon the following:

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